FEDERAL CASE UPDATE AND LOCAL FEDERAL PRACTICE POTPOURRI[1]

Ross A. Walters

United States Magistrate Judge
United States District Court
Southern District of Iowa

SELECTED 2017–18 EIGHTH CIRCUIT AND SUPREME COURT CASES WHICH MIGHT BE OF INTEREST

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I. CIVIL LITIGATION AND PROCEDURE

Calzone v. Hawley, 866 F.3d 866 (8th Cir. 2017) Police officer stopped driver of dump truck on the highway and asked to conduct a suspicionless search. Driver challenged the Missouri statute authorizing the search. Plaintiff had standing to sue the Missouri highway patrol's superintendent, but lacked standing to sue governor and attorney general because they did not cause his injury. Plaintiff could not sue the superintendent in her official capacity for damages because she was not a "person" under § 1983, but he could maintain his claims for declaratory and injunctive relief.

Brazil v. Ark. Dept. of Human Servs., 891 F.3d 957 (8th Cir. 2018) Plaintiff brought suit alleging her supervisors retaliated against her for filing a civil-rights lawsuit. While the suit was pending, plaintiff transferred jobs and became free of the retaliation. Eighth Circuit held the only issue left, prospective injunctive relief, was moot and remanded to the district court to dismiss for lack of subject matter jurisdiction.

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1 I have with their permission shamelessly borrowed material and ideas from my colleagues in the Southern District, Chief Magistrate Judge Helen Adams, Magistrate Judge Celeste Bremer, and Magistrate Judge Stephen Jackson. I gratefully acknowledge their assistance in this as in so many other matters.

Planned Parenthood Great Plains v. Williams, 863 F.3d 1008 (8th Cir. 2017) Court of appeals would not consider the merits of the plaintiff's original claim when only the award of attorney's fees was before it. Plaintiff was a prevailing party because it stopped defendant from prematurely revoking its license to perform abortions.

Adams v. USAA Cas. Ins. Co., 863 F.3d 1069 (8th Cir. 2017) Parties' stipulated dismissal of case before defendants filed an answer in order to forum shop and avoid an adverse result was not sanctionable conduct. At that stage, the reason for dismissal is irrelevant.

Bavlsik v. Gen. Motors, LLC, 870 F.3d 800 (8th Cir. 2017) Plaintiff was injured in van accident and rendered paraplegic. Jury awarded plaintiff $1 million, which was seriously inadequate because plaintiff needed lifetime care. Jury's verdict was not an impermissible compromise verdict, but district court correctly granted a new trial on damages only.

Manning v. Jones, 875 F.3d 408 (8th Cir. 2017) Applicant to professor position's failure to cite record precluded the Eighth Circuit from considering her argument on appeal. Dean's statement during oral argument that hiring responsibility was hers did not preclude her from arguing that it was not when that issue was not on appeal. Eighth Circuit lacked jurisdiction over applicant's political discrimination claim because she did not raise it in her new trial motion.

Wright v. Byron Fin., LLC, 877 F.3d 369 (8th Cir. 2017) Plaintiff failed to preserve for appellate review his argument in his post-verdict motion for judgment as a matter of law by failing to raise it in his pre-verdict motion. Plaintiff impliedly consented to defendant's amendment to its counterclaim by failing to object to evidence supporting the amended counterclaim. District court's remittitur was appropriate because the evidence did not support the jury's award.

In re Borowiak IGA Foodliner, Inc., 879 F.3d 848 (8th Cir. 2018) Defendant filed a motion to amend its answer to, among other things, include a jury demand "as a precautionary measure." While this motion was pending, defendants filed a motion to strike plaintiff's jury demand because plaintiff had waived its right to a jury in a prior contract. Eighth Circuit held that plaintiff was entitled to a jury because defendant requested a jury, so the trial would be a jury trial unless the parties stipulated otherwise.

Raines v. Counseling Assoc., Inc., 883 F.3d 1071 (8th Cir. 2018) Eighth Circuit lacked jurisdiction to over district court's denial of plaintiff's § 1983 claim based under the Fourth Amendment after plaintiff was shot by law enforcement because the district court denied qualified immunity due to fact issues, not legal conclusions.

Bunch v. Univ. of Ark. Bd. of Trs., 863 F.3d 1062 (8th Cir. 2017) Sovereign immunity barred plaintiff's § 1981, § 1983, Americans with Disabilities Act, and Age Discrimination in Employment Act claims against state board of trustees. Plaintiff failed to show that employer's legitimate reason for firing her—her failure to come to work—was pretext.

Does v. Gillespie, 867 F.3d 1034 (8th Cir. 2017) Medicaid beneficiaries did not have an enforceable federal right to choose any qualified provider that offered services a beneficiary sought under the Medicaid Act. Thus, beneficiaries were not entitled to a preliminary injunction prohibiting the Arkansas Department of Human Services from terminating Medicaid agreements with a women's health clinic.

II. CRIMINAL LAW

District of Columbia v. Wesby, 138 S. Ct. 577 (2018) Officers had probable cause to arrest partygoers for unlawful entry when the neighbors identified the house as vacant, the house appeared vacant, the partygoers scattered when the police arrived, their explanations for being at the house were full of holes, and the hostess admitted she had no right to be in the house. Even if officers had lacked probable cause, qualified immunity would protect them because it was reasonable to assume they had probable cause.

United States v. Scott, 876 F.3d 1140 (8th Cir. 2017) Exigent circumstances justified officers entering defendant's garage when defendant was covered in blood, told officers his wife was on drugs, his wife hit him with a truck, and his wife shot him, and there were children inside.

United States v. Mosley, 878 F.3d 246 (8th Cir. 2017) Officers had reasonable suspicion to pull over a car seen leaving the area of a bank robbery after a caller identified the car leaving the area contemporaneously and the car was the only vehicle leaving. This was despite the fact that the caller did not see the bank robbers enter the car and could not be sure it was them. Stop's duration was not unreasonable in light of its mission—to assess whether the vehicle was involved in the bank robbery. Defendants lacked standing to challenge the search of the car's trunk because they were driving the car without permission.

United States v. Thompson, 881 F.3d 629 (8th Cir. 2018) Police did not violate defendant's Fourth Amendment rights by asking regular garbage collection company to take garbage can from its location away from the curb on a normal collection day and empty the can to inspect its contents. Defendant lacked reasonable expectation of privacy in garbage can accessible to the public in the location that the garbage company usually collects it from.

United States v. Buckner, 868 F.3d 684 (8th Cir. 2017) District court did not abuse its discretion in admitting evidence defendant charged with being a felon in possession shot at his neighbor 8 days before the arrest. The evidence was highly probative of an element of the crime and thus intrinsic evidence, and the danger of unfair prejudice did not outweigh its probative value.

McCoy v. Louisiana, 138 S. Ct. 1500 (2018) Defendant's counsel in death penalty murder case admitted defendant's guilt during the guilt phase of the trial to avoid death penalty. Supreme Court held defendant had a Sixth Amendment right to insist that his counsel not admit his guilt, even though it was a strategic decision. Counsel's refusal to maintain defendant's innocence was not required by professional conduct rule prohibiting lawyers from assisting clients in criminal conduct. Allowing the admission of guilt was a structural error.

Wilson v. Sellers, 138 S. Ct. 1188 (2018) Federal habeas court reviewing state-court decision on the merits that does not describe reasoning should "look through" the unexplained decision to the last reasoned decision, and presume the latest court adopted its rationale. The presumption is rebuttable.

III. EMPLOYMENT LAW

Rooney v. Rock Tenn Converting Co., 878 F.3d 1111 (8th Cir. 2018) Title VII does not require an employer to articulate a reason for firing an employee at the time of termination. While a change in the reasoning from the time of termination to the time of litigation might indicate pretext, that was not the case here. The employer here articulated additional reasons for terminating the employee, not different ones. Employee failed to show employer's reasons were pretext.

IV. CONSTITUTIONAL LAW

Minn. Voters All. V. Mansky, 138 S. Ct. 1876 (2018) Minnesota residents challenged Minnesota's law prohibiting wearing political attire at a polling place on election day on First Amendment grounds. Supreme Court held that ban violated Free Speech Clause. Polling place was a nonpublic forum, which means Minnesota had the authority to make restrictions as long as they were reasonable, but these were not because they were ambiguous.

Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017) Nebraska's Funeral Picketing Law did not violate picketer's First Amendment rights. The law was content-neutral, Nebraska had a significant interest in protecting the peace and privacy of a funeral for a short time in a limited space, the law was narrowly tailored, and it left open ample channels of communication.

Morgan v. Robinson, 881 F.3d 646 (8th Cir. 2018) Sheriff's office employee ran against sheriff for sheriff's position and lost. Employee alleged political discrimination. Sheriff was not entitled to qualified immunity because employee spoke on a matter of public concern and did not cause disruption, so the First Amendment protected it. An employee's right to make public statements during a campaign was clearly established at the time.

Div. of Emp't Sec. v. Bd. of Police Comm'rs, 864 F.3d 974 (8th Cir. 2017) Officers' actions in punching decedent/suspect in the face and shooting him to death constituted excessive force when the decedent was compliant with the officers' demands, did not pose a threat, and did not resist arrest. This constitutional right was clearly established at the time. Police board was entitled to sovereign immunity.

Dean v. Searcy, 893 F.3d 504 (8th Cir. 2018) Individuals exonerated of murder charges brought § 1983 claim against county officials alleging violations of their due process rights based on use of false evidence, manufacturing false evidence, and coercing them to plead guilty. Eighth

Circuit held there was sufficient evidence to support jury's finding that sheriff's impact on investigation was official policy, making the county liable. Exoneree's right to be free of conviction based on reckless investigation and manufactured evidence was well established. Deputies were not entitled to qualified immunity.

VI. PRISONERS' RIGHTS

Simpson v. Cty. of Cape Girardeau, 879 F.3d 273 (8th Cir. 2018) Prison's postcard-only policy for all non-privileged mail did not violate the First Amendment. Policy was rationally related to legitimate penological interests of reducing contraband, promoting efficiency. Inmates had other means of communication with outside world. District court's decision to exclude evidence of other institutions' policies was not reversible error because the district court still considered Cape Girardeau's previous policy as an alternative option, so it did not affect plaintiff's substantial rights.

VIII. MISCELLANEOUS

Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) Advocacy groups brought suit challenging Ohio's process for removing voters from its rolls. Ohio identifies voters who have not voted for 2 years, sends them a post-prepaid return card asking them to verify that they live at that address. If the voter does not respond, Ohio removes that voter from its rolls. Removal process did not violate the National Voter Registration Act or Help America Vote Act's failure-to-vote clause because Ohio did not remove voters solely for failing to vote.

PRETRIAL SCHEDULING AND DEADLINES

PRACTICE IN FEDERAL COURT IS RULE DRIVEN, BOTH BY THE FEDERAL RULES OF CIVIL PROCEDURE AND BY THE LOCAL RULES

Scheduling Order and Discovery Plan (SODP) – required by Fed. R. Civ. P. 16(b) and 26(f) – Local Rule 16 governs

- Parties must confer and jointly prepare
- Due 90 days after Complaint filed
- Not required in habeas corpus cases

Form (attached) sets deadlines:

- Initial disclosures (Fed. R. Civ. P. 26 (a)(1)(A) – persons with discoverable information party may use; copy of documents in disclosing party's control; damages computation
- To add parties or amend pleadings
- To disclose expert witnesses (Fed. R. Civ. P. 26(a)(2)
- To complete discovery
- To file dipositive motions (at least 150 days before ready for trial date)
- Ready for trial date

Court will enter an order adopting, or modifying proposed deadlines.

PRETRIAL DEADLINES IN FEDERAL COURT ARE VERY IMPORTANT – MAKE SURE YOU KEEP TRACK OF THEM – THERE ARE CONSEQUENCES IF A DEADLINE IS MISSED

Examples:

Motion to amend a pleading filed after the pleading deadline.

- The good cause standard in Fed. R. Civ. P. 16(b)(4) to modify a scheduling order applies because that is what the tardy motion seeks to do. The liberal pleading amendment standard in Fed. R. Civ. P. 15(a)(2) (leave to amend to be freely granted) does not control.
- Generally, the "primary measure of good cause is the movant's diligence in attempting to meet the [scheduling order] deadline." *Harris v. FedEx Nat. LTL, Inc.*, 760 F.3d 780, 786 (8th Cir. 2008).
- "I forgot," "I was busy," and similar excuses will not do.

Failure to timely disclose expert witness.

New case – *Vandenberg v. Petco*, 17-2580 (8th. Cir. October 4, 2018) (Pet. for rehearing and rehearing en banc filed October 15, 2018).

- Personal injury case — non-retained treating physician not timely disclosed – causation opinion excluded – 8th Circuit affirms.
- Non-retained experts such as treating physicians subject to disclosure requirements of Fed. R. Civ. P. 26(a)(2)(C) — no report required, but must disclose subject matter and summarize facts and opinions to which witness will testify.
- Fed. R. Civ. P. 37(c)(1) provides if disclosure failure "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless" though in addition or instead of the exclusion sanction the court "on motion" may order a lesser appropriate sanction.
- Plaintiff claimed that the doctor's medical records, operative notes, and letter gave ample notice of causation opinions.
- Not good enough, records disclosed facts and opinions, but not what facts and opinions would be offered.
- No justification, plaintiff could have timely disclosed – not harmless because defendant should not have to guess what opinions would be offered.
- District court could have given a lesser sanction, but only on plaintiff's motion and no motion was made – court not obligated on its own to consider lesser sanction.
- Dissent. Disclosure rule was technically violated, but harmless and under circuit authority the court was obligated to consider a lesser sanction where no intentional misconduct or surprise, and the exclusion results in dismissal. Cites *Bergstrom v. Frascone*, 744 F.3d 571, 576 (8th Cir. 2014) (discretion narrows with severity of sanction and dismissal the harshest of all).

Points to be taken: (1) Be sure to *timely* disclose experts as required by Fed. R. Civ. P. 26(a)(2) and (2) When in doubt whether a witness could be seen as a non-retained expert under the rule, make a timely non-retained expert disclosure under Fed. R. Civ. P. 26 (a)(2)(C).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA
DIVISION

_ ,	)	
	)	
Plaintiff(s),	)	NO. _
	)	
vs.	)	
	)	
_ ,	)	**SCHEDULING ORDER AND DISCOVERY PLAN**
	)	
Defendant(s).	)	

Counsel have conferred and submit the following case information and proposed dates for case management:

1. Did the parties both (a) enter into an agreement at the Rule 26(f) conference resolving all issues relating to initial disclosures, and (b) discuss the preservation, disclosure, and discovery of electronically stored information? _ _ yes _____ no
If any party objected at the Rule 26(f) conference to making or to the timing of the initial disclosures, then the objecting party must, within 14 days after this order and plan has been filed, serve and file a document in which the objections are set forth with particularity. If the parties have agreed to a deadline for making the initial disclosures, state the date by which the initial disclosures will be made: _
2. Deadline for motions to add parties: _
3. Deadline for motions to amend pleadings: _
4. Expert witnesses disclosed by: a) Plaintiff: _
b) Defendant: _
c) Plaintiff Rebuttal: _
5. Deadline for ***completion*** of discovery: _
6. Dispositive motions deadline (***at least 150 days before Trial Ready Date***):_
7. Trial Ready Date (***at least 150 days after Dispositive Motions Date***):_
8. Has a jury demand been filed? _______yes __ ___ no
9. Estimated length of trial: _______ days
10. Settlement conference (choose one of the following): (a) _ _____ A court-sponsored settlement conference should be set by the court at this time for a date after: _ ; or
(b) __ __ A court-sponsored settlement conference is not necessary at this time.
11. Should the court order a court-sponsored scheduling and planning conference pursuant to Fed. R. Civ. P. 16(b) and 26(f)? ____yes _______no
12. Do the parties unanimously consent to trial, disposition and judgment by a U.S. Magistrate Judge, with appeal to the Eighth Circuit Court of Appeals? 28 U.S.C. § 636(c).
____yes _____no

______________________________	______________________________
Attorney for Plaintiff(s):	Attorney for Defendant(s):
Address:	Address:
Telephone:	Telephone:
Facsimile:	Facsimile:
E-mail address:	E-mail address:

Attorney for Third-Party Defendant\Other:

Address:

Telephone:

Facsimile:

E-mail address:

JUDGE'S REVISIONS

The deadline in Paragraph is changed to .

The deadline in Paragraph is changed to .

The deadline in Paragraph _ is changed to .

IT IS ORDERED that this proposed Scheduling Order and Discovery Plan
___**is** _ ____ **is not** approved and adopted by this court.

IT IS FURTHER ORDERED that a scheduling and planning conference:

___ will not be scheduled at this time.

___ will be held in the chambers of Judge _ at the U.S. Courthouse in _ , Iowa, on the _ day of _ , at _ o'clock, _ .m.

___ will be held by telephone conference, initiated by the court, on the _ day of _ , at o'clock, _ .m.

DATED this _ day of .

MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case is referred to a U.S. Magistrate Judge for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and the consent of the parties.

DATED this _ day of .

UNITED STATES DISTRICT JUDGE

Fundamentals of Federal Practice Program

October 4, 2018

Role of a MJ and Case Management

- What does a MJ do?
  - Varies from district to district
  - Handle most preliminary criminal matters
  - Case management of civil cases
  - Consent civil cases
  - Settlement conferences
  - Outreach to the bar
- Why do I want to get to know my MJ's?
  - They are very nice
  - They will be the primary judge that you will interact with on civil cases and criminal cases (initially)
  - They know a lot about how the court, judges, and cases operate
- Case management
  - Starts at the scheduling conference
  - Have a good handle on your case, the issues and the discovery that you will need.
  - Be collegial with your colleagues.
  - Don't oversell your case. Your credibility matters.
  - Demeanor. Be prompt, polite and professional.
  - If you do not understand what the judge is saying, ask!
  - What kind of ESI are you anticipating in the case (ESI template)
  - Work at least 90-120 days ahead. Think about what you want to be doing 90 days out and then determine what steps you need to take now to be ready to accomplish the 90-120 day goals.
  - When you are drafting pleadings, consider starting with the jury instructions that govern your claim or affirmative defense.
  - You can consent a full case or pieces of a case to the MJ.
  - Think about whether a settlement conference makes sense and when. What needs to happen first?
  - What is the purpose of a status conference?

- The privilege of allowing attorneys to appear by phone. Do not abuse it.
- Final pretrial conference
- If you have questions about a particular judge's preferred way of doing things, you can ask us and we will do our best to get you the information.

Questions????